

(16,626.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 413

ELIZA COOPER ET AL., PLAINTIFFS IN ERROR,

vs.

EDWARD S. NEWELL AND CLARENCE B. SMITH,
EXECUTORS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

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1 United States Circuit Court of Appeals, Fifth Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable William T. Newman, United States district judge for the northern district of Georgia.

ELIZA COOPER <i>et als.</i> , Plaintiffs in Error,	} No. 511. Error to United States Circuit Court, Eastern District of Texas.
<i>vs.</i>	
EDWARD S. NEWELL and CLARENCE B. SMITH, Executors, Defendants in Error.	

This cause came on to be heard in the United States circuit court of appeals for the fifth circuit on the transcript of record, showing, among other things, the following facts:

This suit was originally brought by Stuart Newell against Eliza Cooper and B. P. Cooper and Fannie Westrope, as defendants, in the circuit court in and for the eastern district of Texas, sitting at Galveston, in the ordinary form of trespass, to try title under the

2 Texas statutes, to recover one hundred and seventy-seven acres of land in Harris county, Texas, described in plaintiffs' petition, which said petition was filed on the 5th day of July, 1890. The said Stuart Newell was alleged to be a citizen of New York, and the said defendants all citizens of Texas.

Prior to the trial of the cause Stuart Newell died, and his executors, Edward S. Newell and Clarence B. Smith, were duly made parties plaintiff, with power and authority to prosecute the suit, and defendant Fannie Westrope intermarried with Joseph J. Millen, and said Joseph J. Millen was duly made a party defendant to the suit. On February 17, 1896, prior to the trial of the case, plaintiffs filed their fifth amended original petition, which under the Texas practice was substituted for and took the place of all previous petitions filed by plaintiffs. In this petition, in addition to the usual averments required to be made by the Texas statutes in an action of trespass to try title, plaintiffs further alleged that they are informed and believe that the defendants set up title to the land in controversy through a judgment rendered on the 20th of May, 1850, in the district court of Brazoria county, Texas, in cause No. 1527, a certified copy of which proceedings were attached to and made a part of said amended petition, in which suit it was alleged that Peter McGrael was plaintiff and Stuart Newell was defendant; and plaintiffs allege that said judgment was null and void and was not binding on the said Stuart Newell nor plaintiffs, nor could defendants claim title under said judgment for the following reasons, viz:

That at the time of the filing of said suit and the rendition of said judgment said Stuart Newell was not a resident of Brazoria

county, Texas, nor of the State of Texas, nor was he then within said Brazoria county or the State of Texas; that at no time did he ever reside in Brazoria county, Texas; that on the 2nd day of January, 1848, said Stuart Newell, who then resided in Galveston county, Texas, removed from said Galveston county to the city of Philadelphia, in the State of Pennsylvania, and resided in
3 said city of Philadelphia, in the State of Pennsylvania, continuously from said date until the year 1854, when he removed from said city of Philadelphia to the city of New York, in the State of New York, where he continued to reside up to the time of his death, to wit, April 11th, 1891.

That during the time of his residence in the city of Philadelphia he was a resident citizen of the State of Pennsylvania, and during his residence in the city of New York he was a resident citizen of the State of New York, and has never at any time been a citizen of the State of Texas, nor has he at any time since the year 1848, when he left Galveston county, been anywhere in the State of Texas, but at all times since said year 1848, up to the time of his death, had resided and been without the limits of the said State of Texas and within the said city of Philadelphia, State of Pennsylvania, and the said city of New York, in the State of New York; that Stuart Newell was never served with citation, process, or otherwise notified of the existence of said suit of Peter McGrael v. Stuart Newell; nor was he a party to said suit with his knowledge, consent, or approval; nor did he submit himself to the jurisdiction of the said court; nor did he employ or authorize any one to represent him or enter an appearance in said suit; nor did he know of the existence of said suit in any manner until just prior to the institution of this suit.

That if any attorney appeared for said Stuart Newell in said suit he did so without any authority, permission, knowledge, or consent of or from the said Stuart Newell, and that such appearance, if any there was, was through collusion with said attorney and plaintiff in said suit to injure and defraud the said Stuart Newell; and it was expressly denied that I. A. or J. A. Swett had any authority or permission from said Stuart Newell to enter an appearance in said cause, nor was such appearance on the part of the said I. A.

4 or J. A. Swett done with the knowledge, consent, or approval of said Stuart Newell; that at the time of the entry of said judgment said Stuart Newell had a meritorious defence to said suit, and was the owner in fee-simple to the lands herein sued for by virtue of a deed of conveyance to him from said Peter McGrael, plaintiff in said suit, executed and delivered on August 9th, 1848, and that at no time since said date had said Peter McGrael any title or interest in the lands in controversy. Attached to plaintiff's said petition was a certified copy of the record in the case of Peter McGrael v. Stuart Newell in district court of Brazoria county, Texas, to which was attached the certificate of the clerk that said record contained a full, true, and correct copy of all the proceedings had in said suit, and which record was afterwards put in evidence on the trial by defendant. This record consists of, 1st, a petition in the ordinary form of trespass to try title, in which Peter McGrael

was plaintiff and Stuart Newell was defendant, and in which petition it was alleged that Peter McGrael was a resident citizen of the county of Brazoria, State of Texas, and that Stuart Newell was a resident citizen of the county of Brazoria, State of Texas. A number of different tracts of land, one of which was situated in Brazoria county, were described in said petition, among them the land in controversy, which was alleged to be situated, then as now, in Harris county, Texas. Said petition likewise contained a prayer that Stuart Newell be cited to appear before the next term of the said district court of said Brazoria county, and that he be condemned to restore to plaintiff the peaceable possession of the said lands, and that he and all other persons be thereafter restrained from disturbing plaintiff in the possession and use thereof, and that defendant be condemned to pay plaintiff five thousand dollars damages for taking possession of said tracts of land, and also be condemned to pay a reasonable rent for the same. Prayer was likewise made for general relief, and that plaintiff be quieted in his title and possession of the said land. This petition was filed on the 20th day of May, 1850, and contained the following endorsement: "This suit is brought as well to try title as for damages. J. B. Jones, att'y for plaintiff."

2nd. The following answer, filed May 20th, 1850, viz:

"In the Honorable District Court, May Term, A. D. 1850.

PETER MCGRAEL }
v. }
STUART NEWELL. }

And now comes the defendant, Stuart Newell, and says that the matters and things in plaintiff's petition are not sufficient in law for the plaintiff to have or maintain his said action against this defendant. Wherefore he prays judgment.

(Signed)

J. A. SWETT,
Att'y for Defendant.

And now, at this term of your honorable court, comes the said defendant, Stuart Newell, and defends, &c., and says that he denies all and singular the allegations in said plaintiff's petition contained.

(Signed)

J. A. SWETT,
Att'y for Defendant.

And for further answer in this behalf the said defendant says that he is not guilty in manner and form as the said plaintiff in his said petition hath complained against him; and of this he puts himself upon the country.

(Signed)

J. A. SWETT,
Att'y for Defendant."

3rd. The following order of court:

" PETER MCGRAEL }
v. } No. 1527.
STUART NEWELL. }

MONDAY, *May* 20, 1850.

In this cause both parties being present, by their attorneys, the demurrer of defendant to plaintiff's petition came on and, being heard by the court, was overruled.

4th. The following decree:

PETER MCGRAEL }
v. } No. 1527.
STUART NEWELL. }

TUESDAY, *May* 21, 1850.

6 This day came the parties, by their attorneys, and the demurrer of the defendant being heard, the same was overruled; and thereupon came the following jury of good and lawful men, to wit (here follow names of the jurors), who, after hearing the evidence and argument, thereupon returned the following verdict:

We, the jury, find for the plaintiff, and that he recover the several tracts of land mentioned and described in the petition.

E. GIESECKE, *Foreman*.

It is therefore ordered, adjudged, and decreed by the court that the plaintiff do have and recover of and from the defendant the several tracts of land in plaintiff's petition mentioned and described and all thereof; that the said Stuart Newell be forever barred from having or asserting any claim, right, or title to all or any portion of said tracts of land or any part thereof, and that the said plaintiff be forever quieted in the title and in the possession of all the aforesaid tracts of land. It is further considered by the court that the plaintiff recover of the defendant his costs of this suit, and that execution issue for the same."

The defendants answered herein, demurring to the plaintiff's fifth amended original petition upon the ground that it appeared therefrom that the plaintiffs thereby attacked collaterally and alleged to be void the judgment of the district court of Brazoria county, in the State of Texas, and within the said eastern district thereof, a court of general jurisdiction of the parties and the subject-matter connected with and involved in said judgment, and that said judgment was a domestic judgment, assailable only in a direct proceeding to impeach it, and that no proceeding had ever been taken to review, appeal from, vacate, or qualify said judgment, and that

plaintiffs' right to do so is now barred by limitation and lost by laches. Defendants also answered by plea of not guilty and the statute of limitation of three, five, and ten years.

7 Upon the trial of the case in the circuit court there was evidence offered by the plaintiffs tending to prove that Peter

McGrael was the common source of title, and that, as alleged in plaintiffs' petition, the land in controversy had been conveyed by said Peter McGrael to said Stuart Newell in fee-simple in 1848, and that said Stuart Newell was not a citizen nor a resident of the State of Texas at the time of the institution of the aforesaid suit of Peter McGrael *v.* said Stuart Newell in the district court of Brazoria county, Texas; that he was never served with any process of any character in said suit; that he had no knowledge of the institution of the said suit until many years thereafter; that J. A. Swett was not his attorney in said suit and had never been employed by him to represent him in said suit, and that any appearance made for him by said Swett in said suit was without the knowledge or consent of said Newell; that in said suit the property in controversy had not been taken into the possession of the court by attachment, sequestration, or other process; that said Stuart Newell had never resided in Brazoria county, Texas; that he resided in Texas, in Galveston county, from April, 1838, to November, 1848; that he left Texas in November, 1848, and went to the city of Philadelphia, and resided there until 1853 or 1854, and from that time on up to the date of his death he had resided in the city of New York, in the State of New York, and during said years was first a citizen of the State of Pennsylvania whilst residing there, and then a citizen of the State of New York whilst residing there.

The evidence tending to establish the above facts was all objected to by the defendants upon the ground that said judgment in the case of Peter McGrael *v.* Stuart Newell was rendered by a domestic court of general jurisdiction, and that said Newell was sued as a citizen of said Brazoria county, and that the record in said suit showed that fact and showed that he was sued therein for the recovery of land, and that he had appeared by his attorney,

8 demurred, pleaded, and answered in the suit, and that his demurrer had been contested before the court and a hearing had on the case before a jury and that judgment was rendered in said suit for the plaintiff, and that said proceeding, judgment, and record import absolute verity, and that want of jurisdiction in said court could not be established outside of said record in a collateral proceeding such as the suit at bar.

These objections were overruled, the evidence admitted, and defendants excepted thereto.

The issue of the validity of said judgment in the case of Peter McGrael *v.* Stuart Newell was submitted to the jury by the following charge of the court, viz:

"There are only two questions left for your consideration: First, whether or not the judgment rendered in Brazoria county May 21, 1850, in favor of Peter McGrael against Stuart Newell was procured without service and without the authorized appearance of

Stuart Newell. If the evidence satisfies your mind that Stuart Newell was not a party to the suit in fact—that is, was not served and did not enter his personal appearance, and did not authorize Mr. Swett to appear for him—you are instructed that the judgment is a nullity and the plaintiffs are entitled to recover this land, unless defendants have it by statute of limitations. If you determine from the testimony in this case that Stuart Newell was represented in that suit by Mr. Swett and he was authorized to represent him, in that event you need not consider the plea of limitation, but return a verdict for the defendants. If Mr. Swett was authorized to appear for Stuart Newell in the litigation, you need not consider the plea of limitation, but return a verdict for the defendants; but if you find from the testimony that Mr. Swett was not authorized to appear for him, then that judgment is a nullity and the title to this property would be in the executors of Stuart Newell, plaintiffs in this case, unless you find under

the plea of limitation which I shall instruct you upon in
 9 favor of the defendants. If you find for the plaintiffs, the form of your verdict will be, 'We, the jury, find for the plaintiffs against the defendants.' If you find for the defendants, the form of your verdict should be, 'We, the jury, find for the defendants the land described in the plaintiffs' petition and against the plaintiffs;' and in that event you are further directed to state whether or not you find the Brazoria County judgment was a valid or void judgment, and you will also state whether you find the defendants have title to the property by limitation; and, if so, you will add, 'We, the jury, find the defendants have the title to the property by reason of the five years' limitation.' Those are two special findings, if you find for the defendants. If you find from the evidence in this case that Stuart Newell authorized Mr. Swett to appear for him in that case, the judgment is valid, but if you find he was not authorized to appear for him, then the judgment is a nullity. The burden of proof is upon the plaintiffs to show nullity of the judgment in Brazoria county."

To this charge of the court the defendants duly excepted and asked the court to give to the jury the following instruction:

"The judgment of the district court of Brazoria county, rendered on May 21, 1850, in the case of Peter McGrael v. Stuart Newell, put the title to the land now sued for in said McGrael, and McGrael's deed to Westrope on March 2nd, 1860, put the title in Westrope, and defendants are entitled to your verdict, and you will find for them."

This instruction the court refused to give, and to this action of the court defendants duly excepted. The jury brought in the following verdict: "We, the jury, find for the plaintiffs, as against the defendants, the land described in plaintiffs' petition;" which verdict was duly received and upon it judgment rendered for plaintiffs.

The defendants in time filed their bills of exception, and
 10 this case was brought to this court by writ of error. Among other assignments of error it was complained that the circuit

court had erred in overruling defendants' demurrer to plaintiffs' petition attacking the validity of said judgment in the case of Peter McGrael v. Stuart Newell and in permitting the introduction of the evidence hereinbefore recited and in charging the jury as hereinbefore recited and in refusing to charge the jury as hereinbefore recited.

Whereupon, the court desiring the instruction of the honorable Supreme Court of the United States for the proper decision of the questions arising on the record, it is ordered that the following question be certified to the honorable the Supreme Court of the United States, in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the circuit courts of the United States, and for other purposes, approved March 3, 1891," to wit:

Was the judgment of the district court of Brazoria county, Texas (said court being a court of general jurisdiction), in the case of Peter McGrael v. Stuart Newell, subject to collateral attack in the United States circuit court for the eastern district of Texas, sitting in the same territory in which said district court sat, in this suit, between a citizen of the State of New York and a citizen of the State of Texas, by evidence *aliunde* the record of the State court, showing that the defendant, Stuart Newell, in said suit in said State court was not a resident of the State of Texas at the time the suit was brought nor a citizen of said State, but a resident citizen of another State, and that he was not cited to appear in said suit, and that he did not have any knowledge of said suit, and that he did not, in fact, appear in said suit, and that he did not authorize J. A. Swett, the attorney who purported to appear for him in said suit, to make any such appearance, and that the appearance by said attorney was made without his knowledge or consent.

June 16, 1897.

12 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 11 pages, numbered from 1 to 11, inclusive, contain a full and perfect transcript of the certificate to the Supreme Court made by said circuit court of appeals in the cause of—

ELIZA COOPER <i>et als.</i>	} No. 511.
<i>v.</i>	
EDWARD S. NEWELL and CLARENCE B. SMITH, Executors.	

as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States In testimony whereof I hereunto subscribe
Circuit Court of my name and affix the seal of said United States
Appeals, Fifth circuit court of appeals this 2nd day of July,
Circuit. A. D. 1897.

J. M. McKEE,

*Clerk of the United States Circuit
Court of Appeals for the Fifth Circuit.*

Endorsed on cover: Case No. 16,626. U. S. circuit court of ap-
peals, fifth circuit. Term No., 413. Eliza Cooper *et al.*, plaintiffs in
error, *vs.* Edward S. Newell and Clarence B. Smith, executors.
(Certificate.) Filed July 13th, 1897.